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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No 284

MARIE BETTINGER and LAWRENCE E. BETTINGER,
Defendants-Petitioners

and CLARA EGGE and LILLIAN HANSON,
Interveners-Petitioners,

vs.

NORTHWESTERN NATIONAL CASUALTY COMPANY and NORTHWESTERN NATIONAL INSURANCE COMPANY,
Plaintiffs.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Defendants and interveners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit dated May 27, 1954, affirming a judgment for plaintiffs who secured a declaration of non-liability under an automobile liability policy.

OPINION BELOW

The opinion of the Court of Appeals (*infra*, p. B-1) has not yet been reported. One opinion of the District Court, District of Minnesota, Third Division, reported at 111 F. Supp. 511 (1953), is in the printed record below, R. 77. The second memorandum opinion is at R. 120.

JURISDICTION

The judgment of the Court of Appeals, one judge dissenting, was entered May 27, 1954 (R. 153); the petition for rehearing (R. 155) was denied July 1, 1954 (R. 167). The jurisdiction of the court is invoked under Section 1254 (1), 28 U. S. C. as amended.

QUESTION PRESENTED

1. Should a United States Court disregard one of its own judgments on a justiciable issue which has become final, and, in subsequent litigation among the same parties, re-examine that issue *de novo?* Or, is the first decision *res judicata* in the second action?

2. Where the controlling state law has been clearly announced by the highest appellate court of the state and the ultimate question is law of that state, is the Court of Appeals free to disregard the State law and set up its own rule of decision?

3. Where a valid policy of liability *indemnity* insurance is issued and liability is imposed upon the insured under circumstances within the scope of the policy, can a purported rule of "insurable interest" defeat policy coverage solely because of questions of property ownership, once the judgment imposing liability has become final?

STATUTES AND POLICY PROVISIONS INVOLVED

The pertinent portions of the statutes and policy provisions involved are set out in Appendix "A", *infra* pp. A-1-4.

1. Minnesota Statutes Annotated, Section 170.54, *Driver Deemed Agent of Owner.*
2. Minnesota Statutes Annotated, Section 170.40, subd. 6, (1), *Motor Vehicle Liability Policy.*
3. Northwestern National Casualty Co., Policy 10925 (Coverages H, I and J):
   a. Insuring Agreement III
   b. Coverage H
   c. Coverage II, (a)
   d. Condition 6
   e. Condition 8
4. Rule 8, (c), *Federal Rules of Civil Procedure for the United States District Courts* (as amended to January 1, 1953)

STATEMENT OF THE CASE

1. Statement of Facts

The Federal District Court of Minnesota has entered two judgments against petitioner Mrs. Bettinger by the terms of which she is obligated to pay heavy damages to persons injured in an automobile collision (R. 19, 92). She has also been denied the automobile insurance purporting to cover the accident. The court, sitting with a jury, first adjudged that she *was* the owner at the time of the accident of a car that was negligently driven in the collision and that there-

fore she was responsible and liable for the resulting damages (R. 92, 87-91). This judgment has become final.

Thereafter, the same court (another judge presiding) adjudged that Mrs. Bettinger was *not* the owner of the car at the time of the accident, and solely because she was not the owner she had no indemnity insurance in respect to it (R. 83-84; 96-97; 120-121). The district court in the second action had before it the record, depositions and certification of the judge sitting in the first action in the same court (R. 87-92, 96-97). But relying on a purported "gift" of the automobile and a bare change in registration from Mrs. Bettinger to her minor son, who used the car under her control and supervision, the court in the second action held that Marie Bettinger had no "insurable interest" in the car, even though she was fully insured when the policy was first issued to her as the named insured. Therefore, and in spite of the fact the policy was to indemnify her as the named insured for liability imposed on the named insured arising out of the use of the car, it was held that the insurance company was not obligated to pay the judgment secured by interveners against Mrs. Bettinger (R. 96).

Marie Bettinger lives on a farm in Dakota County, Minnesota with eight out of her twelve children (R. 57, 73). Her son Lawrence, age seventeen, was living at home and was working for the Faribault Canning Company at the time of the accident (R. 21, 23). Her husband had left her and had many creditors who had given Mrs. Bettinger trouble.

With money given her by another son, LeRoy, when he was home from service in Korea at the funeral of another son killed in Korea, Mrs. Bettinger made a $175.00 down payment on a 1941 Studebaker about August 11, 1951 (R. 53, 74, 36, 38). Mrs. Bettinger alone was obligated on the

balance of $150, and at the time of the accident she still owed the First National Bank of Hastings, Minnesota, some $75.00 on the car.

The registration (Minnesota is not a title state) and insurance were issued to Mrs. Bettinger and she handled the closing details personally (R. 74-75). The trial court in the instant action found that at the time the insurance policy was issued, August 14, 1951, Mrs. Bettinger was the registered owner of the automobile, held legal title thereto, and that she had an insurable interest in it (R. 94).

Moreover, at all times Mrs. Bettinger could not drive. Her son Lawrence was the only member of the family who drove the car (R. 23, 49). Lawrence used it to run errands for his mother, drive her to church and perform like services of a family nature (R. 23, 49, 62). At the time the car was bought, Lawrence was not living at home but was working and living at the farm of one Henry Delska. At the time the insurance was taken out and the car bought, Mrs. Bettinger stated she had no intention of driving the car herself, but did intend Lawrence to drive it for her (R. 59, 75)—a fact which she told the dealer when she bought the car (R. 54). The auto dealer arranged the insurance. Also the insurance agency office was informed that the principal driver of the car would be under 25 years of age (R. 45).

Later in August, Mrs. Bettinger caused the registration of the car to be transferred to her son Lawrence. In Minnesota, registration is only prima facie evidence of ownership. Her reason was that her husband had many creditors who had given her trouble and she did not want them to take the car away from her (R. 61, 75). But she always still regarded the car as hers and continued to assert her ownership after the accident (R. 61, 62, 75), and in both lawsuits. No con-

trary evidence was ever introduced, except the transfer of registration to Lawrence, and except some loose declarations attributed to Lawrence, but not claimed to have been uttered either in her presence or with her knowledge.

On October 22, 1951, Mrs. Bettinger received a notice from an agent of the insurance companies that the policy would be cancelled five days from that date, on October 27, 1951 (R. 12, 14). The reason given to the agent by the insurance company was that they "had confidential information about the father of the people; and that caused them to want to be off the risk." (R. 45)

On October 26, 1951, a day before the notice of cancellation became effective, the accident occurred. Lawrence, who had the car at work, collided with another automobile in which Lillian Hanson and Clara Egge, the intervenors below, were passengers and injured.

Clara Egge and Lillian Hanson brought suit in May of 1952 against Mrs. Bettinger and Lawrence Bettinger to recover damages for personal injuries (R. 127, 129). The insurance companies in May of 1952 refused to defend, although a tender of defense was made by Mrs. Bettinger (R. 5, 10). Sufficiency of this notice and tender has never been questioned.

Before the personal injury actions by Egge and Hanson were tried, the insurance companies filed a suit for declaratory judgment seeking an adjudication of non-liability on the policy on the grounds that at the time the policy was issued, Mrs. Bettinger was not the owner of the automobile as she represented and had no insurable interest in it, and that Lawrence was the owner. (R. 6-7)

The personal injury action was tried first before Judge Bell and a jury (R. 87). Based upon testimony of Mrs.

Bettinger that she was at the time of the accident and at all times the sole owner of the car, and that the car was driven by Lawrence with her consent, the court directed a verdict for each of the plaintiffs against both defendants. The jury awarded Clara Egge $22,500 and Lillian Hanson $5,000 (R. 19). Judgments were entered on these verdicts and were never appealed, so became final.

Thereafter, the instant case came on for trial before Judge Donovan, also of the Third Division of the United States District Court for the District of Minnesota, without a jury. Judge Donovan decided that while the policy was valid in its inception, the bare transfer of registration from Mrs. Bettinger to Lawrence was a transfer of actual ownership of the car, and that hence Mrs. Bettinger had no insurable interest in the car, and that the indemnity policy became void upon transfer of the registration. The Court of Appeals affirmed, one judge dissenting.

More important, the trial court also held that the ownership of the car at the time of the accident was not *res judicata* even though the previous judgment had been based on Mrs. Bettinger's ownership. The question of ownership was said to have been "left at large" in the first action. (111 F. Supp. 511, 515; R. 82) Various motions and proceedings were had in which Judge Donovan's attention was more specifically invited to the first proceedings in his own court and particularly to the charge and certificate of Judge Bell that liability of Mrs. Bettinger was based solely on her ownership of the car at the time of the accident under Minnesota Statutes, 1949, Sec. 170.54 (R. 92), but Judge Donovan held that *res judicata* did not apply (R. 120). The Court of Appeals affirmed, one judge dissenting.

Thus, this case reached a stage which in the annals of the law surely must be unique. Mrs. Bettinger was sued in the main action as a defendant. Her liability before Judge Bell and the jury—the insurer refusing to defend—was sought and was held to exist, *solely* on account of her *ownership* of the automobile at the time of the accident. Yet in the second action the insurance company was held not to be liable on its indemnity policy *solely* because of her *non-ownership* of the automobile at the time of the accident, the court saying "Res judicata does not apply to the case at bar." (2d Memorandum—not published, R. 120).

In the first action the insurance companies chose not to produce the evidence they had on Mrs. Bettinger's ownership. Instead they refused to defend and purposely sat by while the court tried out the issue of ownership, even though they were put on notice when the court denied their motion to try the declaratory judgment proceeding first. A trial and judicial determination of the fact issue of ownership was thus made with the full knowledge, inaction, and consent of the insurance companies as to the basic fact which they claimed in their own action precluded coverage by the policy of insurance.

2. Jurisdiction Below

Jurisdiction below was based upon 28 U. S. C. A. Sec. 2201, The Federal Declaratory Judgment Act, by reason of diversity of citizenship and the amount in controversy being in excess of $3,000.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals cuts away the very heart of state safety responsibility statutes imposing liability upon owners of automobiles merely because of ownership. The purpose of such statutes has been to secure for persons injured in automobile collisions the benefits of the ability to pay and the financial responsibility of automobile owners where the automobile is driven with the owner's consent. If, under federal procedure, it can be decided after litigation of the issue on one day that liability will be imposed because of ownership, and solely because of ownership, but on the next day that no recovery can be had under the policy of indemnity issued to the named owner because ownership was non-existent at the time of the accident, then (1) the safety responsibility statutes are worthless, (2) the apparent owner for purposes of liability has a completely illusory indemnity policy, and (3) the decisions of the same division of the same Federal District Court may be self-contradicting on an identical issue merely because that issue is seen in a slightly different procedural context by a different judge of the same division.

These harsh results are reached by the Court of Appeals even though its majority opinion conflicts with decisions of other courts of appeals on the issue of *res judicata*. Moreover, it fails to give effect to decisions of this Court and Minnesota law as to *res judicata*. And the decision below is probably in conflict with Minnesota decisions and with decisions of at least one other circuit as to what is an "insurable interest" under the indemnity provisions of an automobile liability policy.

1. The decisions below, that the decision in the first case before the same Federal district court as to ownership of the car was not binding in the second action before the same court (a different judge sitting), are contrary to sound federal procedure and have no precedent in federal procedural law.

These reasons for granting the writ were most lucidly stated in the dissenting opinion by Woodrough, Circuit Judge, in his dissenting opinion (Appendix "B", *infra*, p. B-1 at B-15):

> "The insurance companies chose not to produce the evidence they had on the issue of Mrs. Bettinger's ownership, but purposely stood by while the court tried out the issue, as justly and fairly as it was allowed to do, on the evidence that was adduced in the damage cases. Its solemn final determination was as stated, that Mrs. Bettinger was the owner of the car and liable for the damages.
>
> "It seems to me that the elemental principles of the law relating to indemnities then forbade the insurance companies to go back before the same court and assert against Mrs. Bettinger that she was not the owner of the car which the court adjudged that she was the owner of.
>
> "It can be seen by anybody that to permit the companies to so disregard the court's judgment invites the very anomaly of self contradicting decision that confronts us here. The federal courts and other courts are called on every day to decide justly between auto owners, injured persons, and insurance companies in respect to the rights and obligations accruing to them from collisions. A federal procedure in which it may be decided between them as to the controlling fact in controversy on one day that it is so, and on the next day that it is

not so, is not compatible with sound dispensing of justice.

"In this litigation Mrs. Bettinger's liability and the validity of her insurance policy both depended on whether she owned the car at the time of the accident. The affirmance here of the District Court's conclusions that she did own the car and that she did not own it is decided on first impression, nothing analogous being cited. The states imposing liability on automobile owners merely because of ownership are numerous as are the accidents, and the precedent of the affirmance by this court is of far-reaching importance."

Cf., Note, "Automobile Liability Insurance—Financial Responsibility Law—Rights of Injured Person When Insured Has Breached Warranty or Condition", 33 *Minnesota Law Review*, 525 (1949).

2. The decision below is in conflict with *Aetna Casualty & Surety Co. v. Abbott*, 130 F. 2d 40 (CCA-4, 1942), and fails to give effect to the principles announced by this Court in *United States v. Munsingwear, Inc.*, 340 U. S. 36 (1950).

In the *Munsingwear* case, the first case was brought by the government in the Federal District Court of Minnesota and went to trial before the court sitting without a jury on the count of whether an injunction should issue in regard to O. P. A. Price regulations. The District Court held that the prices complied with the regulation. The case was appealed, but while the appeal was pending, the case became moot because the commodity was decontrolled. The Court of Appeals dismissed the appeal for mootness.

The defendant then moved the same District Court to dismiss the second count for treble damages which was yet untried on the ground that the unreversed judgment of the

District Court in the injunction suit was *res judicata* of those other actions. This motion was granted and the second action dismissed. The Court of Appeals affirmed by divided vote.

The Supreme Court noted that the same controversy was basic to each of the suits, namely the proper pricing formula under the regulation. The parties were the same and the first judgment remained unmodified. This court held (340 U. S. 36, 38):

> "* * * We start then with a case which falls squarely within the classic statement of the rule of *res judicata* in Southern Pacific R. Co. v. United States, 168 U. S. 1, 48-49, 18 S. Ct. 27, 42 L. Ed. 355:
>
> > "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."
>
> * * * *
>
> "* * * The question whether the respondent had sold the commodities in violation of the federal regulation, having been determined in the first suit, is therefore laid at rest by a principle which seeks to bring litigation to an end and promote certainty in legal relations."

The Government in the *Munsingwear* case, like the insurance company in the instant case, failed to take adequate steps to preserve its rights in the first case. Here the insurer could have defended the first action and presented any evi-

dence as to ownership and appealed any judgment it thought adverse to its rights. The defense could have been made under a reservation of rights under the policy on the question of coverage. But once the question of ownership was determined and litigated in the first action, the insurance company should not be heard to say the very same fact of ownership at the time of the accident was different as to the same parties and the same operative facts for the purpose of escaping liability on a policy that obligated the company to defend.[1]

Paraphrasing the last paragraph of the *Munsingwear* opinion, this case is therefore one where the insurance company, having slept on its rights after being placed on full notice that the issue of ownership was to be litigated in the case first to come to trial, now has asked the courts below to do what by orderly procedure it could have done for itself. Compare also *Angel v. Bullington,* 330 U. S. 183, 189-190 (1947). The case illustrates perfectly the hardships which result when *res judicata* is not applied, and the need for that rule in federal procedure in providing a terminal point for litigation.

Such principles were applied against relitigation by the Fifth Circuit in *Aetna Casualty Co. v. Abbott,* 130 F. 2d 40 (1942) where a safe deposit indemnity insurance policy was involved. There had been an action in a state court against the named insured bank resulting in a final judgment that the bank was liable for the loss of certain property. In the first action, which the insurance company defended under

[1]Insuring Agreement II provides in part:

"(a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, *even if such suit is groundless, false or fraudulant;*—" (Italics added)

the policy, certain defenses were litigated and adjudicated. Subsequently the claimant brought suit against the insurance company. The court held that where the defenses asserted in the second action had been pleaded and fully passed on in the first action, they could not be litigated again in the second action. The insurance company was bound by the first judgment *as a person in privity* with one of the parties to that action, therefore an issue litigated in the first action was binding on it. It was urged that because the issues were different—namely the question of coverage in the second action—therefore defendant was not bound by the first judgment (130 F. (2d) 40, 42):

> "* * * The answer is that the facts upon which coverage depends were involved in that action, and the facts asserted here as a defense with respect to coverage were asserted there as a defense to a recovery against the bank. Even though there be a difference of issues, defendant is bound as to facts actually litigated and determined. National Bondholders Corp. v. Seaboard Citizens Nat. Bank, supra (4 Cir., 110 F. 2d 138, 143)."

In the instant case, both courts below state the fact of ownership was litigated in the first action, and neither court questioned the conclusiveness of that litigation. Both courts, whether correctly or not, have emphasized that ownership at the time of the accident is the controlling fact as to whether Mrs. Bettinger is covered by the policy or not. If on the one hand the insurance company *could* have litigated the question of ownership in the first case, but slept on its rights and did not do so, then the courts below have disregarded the *Munsingwear* case 340 U. S. 36, and are in error. If on the other hand, the courts below have based their decision on the contention that different issues are involved in the second ac-

tion—namely the risk covered by the policy—then the opinion of the Eighth Circuit conflicts directly with *Aetna Casualty & Surety Co. v. Abbott,* 130 F. 2d 40, 42 (CCA-4, 1942) and *National Bondholders Corp. v. Citizens Nat. Bank,* 110 F. 2d 138, 143-144, also in the Fourth Circuit.[2]

There are a number of indications in the Rules of Civil Procedure for the Federal District Courts that *res judicata* is a matter of Federal procedure. Compare Rules 8 (c), 12, and 54. This would be particularly so where the conflicting results and decisions came from the same Division of the same Federal District Court.

3. The decision below also has overlooked the state law of *res judicata* and therefore appears to disregard *Erie Railroad Co. v. Tompkins,* 304 U. S. 64 (1938) and *Guaranty Trust Co. v. York,* 326 U. S. 99 (1945).

No mention is made in the decision below of the Minnesota cases holding that *res judicata* applies against the indemnitor in a second action on the coverage where the same fact issue was litigated in the first action. In at least three cases the Minnesota Supreme Court has so held: *Olson v. Schultz,* 67 Minn. 494, 70 N. W. 779, 36 L. R. A. 790 (1897); *State Bank v. American Surety Co.,* 206 Minn. 137, 288 N. W. 7 (1939); and *Liberty Mutual Ins. Co. v. J. R. Clark Co.,* —— Minn. ——, 59 N. W. (2d) 899 (July, 1953). These cases establish as a matter of Minnesota law that where:

> A. The applicability or validity of an indemnity agreement depends upon a given answer to a certain fact issue, and

[2]See also *Heiser v. Woodruff,* 327 U. S. 726 (1946); *Angel v. Bullington,* 330 U. S. 183 (1947) where this court has indicated that failure to apply *res judicata* in the second action presents an important question in the administration of justice.

B. That same fact issue is in litigation against the insured, and the insured's liability depends upon the same answer to the fact issue, and

C. A formal tender of the defense and notice of the other litigation are made by the insured to the indemnitor—

Then the decision on that fact issue made in the decision against the insured is *res judicata* on that issue as between the insured and the indemnitor.

In *State Bank v. American Surety Co.*, 206 Minn. 137, 288 N. W. 7 (1939), a cashier took money from the insured bank covered by American on an indemnity bond policy. One Connors sued that bank on certain certificates of deposit and recovered a judgment against the bank. Due notice was given by the insured bank to the indemnity company of pendency of that suit and tender of the defense. The indemnity company refused to defend. The bank later sued the indemnity company and recovered. On appeal the indemnity company urged that the defalcation was not within the coverage, that proper notice was not given it and the judgment in the first case was not admissible to prove the defalcation since the indemnity company was not a party to that action. The Minnesota Supreme Court affirmed the judgment for plaintiff below, holding (288 N. W. 7, 9):

> "A judgment recovered against an indemnitee upon an obligation covered by a contract of indemnity is conclusive against the indemnitor in an action by the indemnitee to recover indemnity, if the indemnitee gave the indemnitor notice of the pendency of the action in which the judgment was recovered and requested him to assume the defense, Milavetz v. Oberg, 138 Minn. 215, 164 N. W. 910; Trustees of First Presbyterian Church

v. U. S. F. & G. Co. 133 Minn. 429, 158 N. W. 709; Great Northern R. Co. v. Akeley, 88 Minn. 237, 92 N. W. 959; Note, 132 Am. St. Rep. 759; 1 Freeman, Judgments, 5th ed., Sec. 447; 34 C. J. p. 1031, Sec. 1463. * * * The issue (in the first case) was whether the particular transaction was a deposit of cash by Connors with the bank or a renewal of the cashier's personal note. *It was the determination of this issue that fixed the liability of the bank on the theory of receipt of money. The judgment is conclusive on defendant and was properly admissible to show its liability and the extent thereof to Connors* * * *" (Italics added)

It should be observed that the instant case involves all the elements present in the *American Surety* case: (1) Liability in the first action was also held the basis of liability of the indemnity company on its policy. (2) The defense had been tendered the insurance company and it had refused. (3) The issues in the first action as to whether defalcation had occurred were the same attempted to be retried in the second action, just as here ownership at the time of the accident was attempted to be litigated as the controlling fact issue in the second accident. The *American Surety Case* also explains the principles of *estoppel in pais* which require that the indemnity company be bound by the first judgment where it has had a notice and tender of defense but refuses to defend.

In *Olson v. Schultz,* 67 Minn. 494, 70 N. W. 779 (1897), one Lyman was injured in a fall down an elevator shaft. He brought suit in United States Court to recover for personal injuries. The building lessee duly notified the building owner of pendency of the action, but the owner refused to appear and defend. The lease provided the owner of the building

was to keep the elevator and approaches in constant repair. In the first action in federal court there was a verdict for the injured plaintiff. The lessee paid the judgment, then brought suit in the state court to recover on the covenant in the lease. The trial court directed judgment for the lessee and the appeal followed. On appeal the Minnesota Court affirmed and held (70 N. W. 779, 780):

> "The counsel for the appellant has devoted considerable space in his brief to a discussion of the question of whether the elevator was out of repair on—the date of the accident. We are of the opinion that this question was determined adversely to the contention of the appellant in the former action, *and that the judgment entered in that action concludes the appellant herein,* as that was one of the very questions litigated in that action. The complaint in the former action of Lyman v. Olson contains an allegation that the elevator was in an unsafe and dangerous condition, and unfit for use, at and for some time prior to the time of injury to Lyman. *We are also of the opinion that the question of Lyman's being injured by reason of such defective condition of the elevator,* and the *amount of damages which he thereby sustained, were settled by the verdict and judgment entered thereon in the former action,* and are not now open for discussion or adjudication upon the merits in this action. *Schultz had due notice of the pendency of that action, and was afforded an opportunity to appear and defend, which he neglected and refused to do, and was as effectually concluded thereby as though he had duly appeared* therein and contested these questions upon the merits. City of Wabasha v. Southworth, 54 Minn. 79, 55 N. W. 818; Ericson v. Brandt, 53 Minn. 10, 55 N. W. 62." (Italics added)

Again, the fact that the indemnitor refused to defend the first action estopped his questioning in the second action

the conclusiveness of the fact issue litigated in the first action which should also have been the result here.

In the *J. R. Clark* Case ——Minn. ——, 59 N. W. (2d) 899 (1953), the Minnesota Supreme Court held that a verdict reached in the first action in a Missouri Court, where the warrantor had been tendered the defense and refused, was *res judicata* on the issue of breach of warranty and facts as to construction of a ladder. Therefore the liability of the indemnitor and warrantor were conclusively established by the judgment in the first action. That this is a general rule in Minnesota, see also 10 *Mason's Minnesota Digest,* Sec. 5176, and the cases cited at note 22; 9 *Id.,* Sec. 4341.

And so this reduces itself to the narrow question whether where liability was imposed on Mrs. Bettinger because of her ownership found in the first action to exist at the time of the accident, a second federal district judge can disregard similar rules of *res judicata* in both federal law and the applicable Minnesota law. If the State law controls and *res judicata* is a matter of substantive law, then under *Erie R. Co. v. Tompkins,* 304 U. S. 64 (1938) and *Guaranty Trust Co. of New York v. York,* 326 U. S. 99 (1945), the courts below have erred in refusing to follow the applicable Minnesota decisions.

But *Heiser v. Woodruff,* 327 U. S. 726 (1946) seems to say that the principle is one of Federal law (327 U. S. 726, 733):

> "But we are aware of no principle of law or of equity which sanctions the rejection by a federal court of the salutary principle of res judicata which is founded upon the generally recognized public policy that there must be some end to litigation—"

On the other hand, *Angel v. Bullington*, 330 U. S. 183 (1947) seems to say it is a matter of State law (330 U. S. 183, 186):

> "We start with the fact that the prevailing rule as to res judicata is settled law in North Carolina. An adjudication bars future litigation between the same parties not only as to all issues actually raised and decided but also as to those which could have been raised. Southern Distributing Co. v. Carraway, 196 N. C. 58, 60, 61, 144 S. E. 535; Moore v. Harkins, 179 N. C. 167, 101 S. E. 564—"

The dissents by Mr. Justice Reed and Mr. Justice Rutledge, joined by Mr. Justice Jackson, question the application of *res judicata* as a matter of local law. It is petitioner's position that whichever law—State substantive or Federal procedural—is controlling, *res judicata* should have been applied below.

Moreover, the Court of Appeals makes no attempt to reconcile its decision with the controlling Minnesota law, as set forth in the three cases mentioned above, which certainly establish the proposition that under the state law the decision on ownership in the first action is *res judicata* in the second. Thus the court below appears to be establishing *its own rule*, in complete disregard of the applicable state law. This can hardly have been an inadvertence, for three Minnesota cases were featured in petitioner's brief to the court below; and again in the petition for rehearing, which was summarily denied.

4. The decision below as to what is an "insurable interest" under an automobile liability indemnity policy is in conflict with the decision of the Seventh Circuit in *Hawkeye-Security Ins. Co. v. Presbitero & Sons*, 209 F. 2d 281 (1954), and is in conflict with applicable Minnesota decisions.

The opinion below misconstrued appellants' argument that *ownership* is not a requirement for "insurable interest" under an automobile liability indemnity policy. Appellants below urged the general rule stated in 6 Blashfield, *Cyclopedia Automobile Law*, Sec. 3873, p. 537 that an *interest in the property* is not necessary to have an "insurable interest" under an automobile liability indemnity policy. But the court below concluded (Infra, p. B-12):

> "The contention that the rule of 'insurable interest' has no application to liability insurance is at best a doubtful question of Minnesota insurance law as to which this Court will accept the views of the trial court—"

There are then cited Eighth Circuit cases holding that in doubtful cases of local law the trial court's judgment will be accepted, sidestepping the issue.

The practical result of the decision below is that the court has accepted the requirement of ownership of the property necessary for property (fire, theft, and loss by sinking) insurance, and imported that doctrine into an automobile use and operation liability indemnity policy. This is contrary to the general law on the subject and has no foundation in Minnesota law.

Exactly the opposite conclusion has been reached in a very similar automobile case as a matter of general law in *Hawkeye-Security Ins. Co. v. Presbitero & Sons*, 209 F. (2d) 281, 283 (CA-7, 1954):

> "The ownership is not the decisive fact. The use is all important, and, inasmuch as the insurer has placed no qualification upon the insured's right to permit any employee or whomsoever he wishes to use and operate the cars, the essential elements constituting the liability

> exists. This is obvious when we observe that if the corporation (rather than the officer of the corporation in whose name the car was held) had held full title, the insurer would be under the same liability, inasmuch as the insured's employee, Michael O. Presbitero was, by the policy authorized to operate and use the car."

Thus, the decision of the Eighth Circuit to the effect that ownership at the time of the accident was controlling as to the validity of the policy conflicts squarely with that of the Seventh Circuit.

The decision below as to the effect of ownership at the time of the accident is inconsistent with Minnesota decisions on the subject of liability indemnity insurance, *e. g., Banner Laundry Co. v. Great Eastern Casualty Co.,* 148 Minn. 29, 180 N. W. 997, 999 (1921); *M. St. P. & S. S. M. R. Co. v. Home Insurance Co.,* 64 Minn. 61, 66 N. W. 132 (1896). See also 9 *Mason's Dunnell Minnesota Digest* (3d Ed.) "Insurance" Sec. 4641 and Sec. 4875c, 6. In the *Banner Laundry* case the court said (180 N. W. 997, 999):

> "* * * The authorities all agree that it is not necessary that the insured should have an absolute right of property, and that he has an insurable interest if, by the destruction of the property *he will suffer a loss,* whether he has or has not any title to, lien upon, or possession of the property itself, (citing many cases and authorities) * * *"

The effect of the decision below is to deny insurance coverage if mere registration is transferred in Minnesota even though loss or liability may arise to the named insured. In a state which does not have titles for automobiles and where registration is only *prima facie* evidence of ownership, this result seems to violate the very basic premises of automobile lia-

bility indemnity insurance. It is a brazen attempt to import the restrictions of ownership in property insurance law into liability indemnity coverage simply because the two policies are now for convenience printed on one form, and to defeat the safety responsibility statutes in the various states.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

1. Minnesota Statutes Annotated, Section 170.54, *Driver Deemed Agent of Owner,* reads as follows:

"170.54 Driver deemed agent of owner

Whenever any motor vehicle, after Laws 1945, Chapter 285,[1] becomes effective, shall be operated upon any public street or highway of this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof. Laws 1945, c. 285, § 34.

[1]Sections 170.21 to 170.58."

2. Minnesota Statutes Annotated, Section 170.40, subd. 6, (1), *Motor Vehicle Liability Policy,* reads as follows:

"170.40 Motor vehicle liability policy

* * * * *

Subd. 6. Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

(1) The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be canceled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy."

3. Northwestern National Casualty Co., Policy 10925 provisions read as follows:

a. *Insuring Agreement III.*

"III Definition of Insured

With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission. The insurance with respect to any person or organization other than the named insured does not apply:

(a) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof;

(b) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer. (Division b does not apply to policies issued or delivered in the State of Wisconsin.)"

b. *Coverage H*

"Coverage H—Bodily Injury Liability

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile."

c. *Coverage II, (a)*

"II Defense, Settlement, Supplementary Payments

As respects the insurance afforded by the other terms of this policy under coverages H and I the company shall:

(a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;"

d. *Condition 6*

"6. Action against Company
Coverages H and I

No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy.—"

e. *Condition 8*

"8. Financial Responsibility Laws
Coverages H and I

Such insurance as is afforded by this policy for bodily injury liability or property damage liability shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising

out of the ownership, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph."

4. Rule 8 (c), *Federal Rules of Civil Procedure for the United States District Courts* (as amended to January 1, 1953) reads as follows:

"Rule 8. General Rules of Pleading

* * * * *

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

APPENDIX "B"

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 14,960

Marie Bettinger and Lawrence E. Bettinger, (Defendants), and Clara Egge and Lillian Hanson (Interveners), Appellants,

vs.

Northwestern National Casualty Company and Northwestern National Insurance Company, Appellees.

Appeal from the United States District Court for the District of Minnesota.

[May 27, 1954.]

John J. McBrien for Appellants Marie Bettinger and Lawrence E. Bettinger.

Philip Stringer (Robert O. Sullivan, Arthur J. Donnelly, and R. Paul Sharood were with him on the brief), for Appellants Clara Egge and Lillian Hanson.

James E. Finley for Appellees.

Before SANBORN, WOODROUGH, and THOMAS, Circuit Judges.

SANBORN, Circuit Judge.

This is an appeal from a judgment for the plaintiffs, Northwestern National Casualty Company and Northwestern National Insurance Company, in an action for a declaration of nonliability under their automobile liability policy No. 10925 issued to Marie Bettinger, of Dakota County, Minnesota, on August 14, 1951, for the term of one year. Jurisdiction is based on 28 U.S.C.A. §2201, there being the requisite diversity of citizenship and amount in controversy.

The policy insured Marie Bettinger against "Loss of or damage to the Automobile [described in the policy], except by Collision or Upset but including Fire, Theft and Windstorm," and liability for bodily injury and property damage "caused by accident and arising out of the ownership, maintenance or use of the automobile." Bodily injury liability limits were "$25,000 each person" and "$50,000 each accident." Property damage liability was limited to $5,000. The policy covered "any person while using the automobile * * * provided the actual use of the automobile is by the named insured or with his permission." The policy provided that the Insurance Companies should defend any suit, "even if such suit is groundless, false or fraudulent," against the insured for injury or damages caused by the automobile while being used by the assured or with her permission.

The automobile described in the policy was a used Studebaker purchased from an automobile dealer in Hastings, Minnesota, on August 11, 1951. Lawrence Bettinger, the seventeen year old son of Marie Bettinger, conducted the negotiations for its purchase. The automobile was purchased under a conditional sales contract signed by Marie Bettinger.

The dealer in Hastings from whom the automobile was purchased ordered insurance for it. He was not an agent of the Insurance Companies. The insurance was written by the Sontag Insurance Agency in Hastings upon information furnished by the dealer. The registered title to the automobile was transferred by the dealer to Marie Bettinger, and a "registration card," showing her to be the owner, was issued to her by the Secretary of State of the State of Minnesota. On August 22, 1951, she transferred the title to the automobile to Lawrence Bettinger, using for that purpose the "bill of sale" form on the reverse side of her "registration card." In executing the form she signed a statement that she sold the automobile to Lawrence, and he executed an application for transfer stating that he had purchased the automobile from her. The "bill of sale" and "application for transfer" both recite that the statements were subscribed and sworn to before a Notary Public. A "registration card" was thereafter issued to Lawrence Bettinger as owner of the automobile.

At the time the automobile was purchased and until Lawrence went to work for the Faribault Canning Company in September, 1951, he was working for and living with a farmer named Delska, whose farm was less than a mile from the Bettinger home. While he was working for Delska, he had the automobile with him at the Delska farm. He was there a little over two weeks, when he and Delska went to work on farms for the Faribault Canning Company. No one but Lawrence ever drove the automobile.

On October 22, 1951, Marie Bettinger received a notice from the Agent of the Insurance Companies that the policy in suit would be cancelled five days from that date, or October 27, 1951.

On October 26, 1951, the automobile, while being driven by Lawrence in connection with his work, collided with another automobile in which Lillian Hanson and Clara Egge were passengers. They were both injured.

In May of 1952 each of them brought an action against Marie Bettinger and her son Lawrence to recover damages for bodily injuries, based upon the claim that Marie Bettinger was the owner of the automobile, that it was being operated by Lawrence with her consent, and that his negligence in the operation of the automobile caused the collision and the resulting injuries. Section 170.54 Minnesota Statutes Annotated provides that "Whenever any motor vehicle * * * shall be operated upon any public street or highway of this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof."

On May 26, 1952, the Insurance Companies received from Marie Bettinger the summons and complaint in each of the personal injury actions, together with a demand that the Companies assume the defense.

On May 29, 1952, counsel for the Insurance Companies returned the complaint and the summons in each of the cases with a letter stating that the Companies refused to defend her in the actions "for the following reasons":

"1. That at the time of the issuance, August 14, 1951, of Policy No. 10925, you were not the owner of the automobile therein referred to and insured.

"2. That in the 'Declarations,' Item No. 7, you represented that you were the sole owner of the insured automobile. This was a misrepresentation.

"3. That on or about August 22, 1951, the registered title to said automobile was transferred to Lawrence Bet-

tinger. That there was no assignment of said policy and that subsequent to that date, and in particular, on October 26, 1951, you had no insurable interests in the automobile insured by said policy and therefore, said policy was not in effect on October 26, 1951."

The Bettingers retained counsel, who filed answers in the personal injury actions, denying liability.

On July 8, 1952, the depositions of Marie Bettinger and Lawrence Bettinger were taken by counsel for Clara Egge and Lillian Hanson, plaintiffs in the personal injury actions brought by them. The substance of Marie Bettinger's testimony was that she had purchased the automobile with money furnished her by one of her sons who was in the Army; that she never drove it herself, but owned it at all times; and that on August 22, 1951, she transferred the title to Lawrence to avoid the danger of having the automobile taken by her husband's many creditors.

In his deposition Lawrence testified, with respect to the ownership of the automobile, that on October 26, 1951, he was living at home with his mother; that he drove the automobile for her when she wanted to go somewhere; that he was driving it to work on the day of the accident, with his mother's consent.

The depositions of the Bettingers were filed in the District Court on July 21, 1952.

On August 6, 1952, the Insurance Companies brought the instant action against Marie Bettinger and Lawrence E. Bettinger to secure an adjudication of nonliability, claiming (1) that at the time the policy was issued Marie Bettinger was not the sole owner of the automobile as she represented, that she actually had no insurable interest in it, and that Lawrence was the owner, (2) that on August 22, 1951, Marie Bettinger executed a bill of sale transfer-

ring the registered title to the automobile to Lawrence, and that upon his application the Secretary of State of the State of Minnesota transferred the title to him, and (3) that on October 26, 1951, she had no insurable interest in the automobile, and that the policy was not in force and effect.

The Bettingers, in their answer to the complaint of the Insurance Companies, asserted that Marie Bettinger was at all times the owner of the automobile and that on or about August 21, 1951, for personal reasons and without intending to transfer any right, title or interest in the automobile, she transferred the registration of it to Lawrence. The Bettingers further alleged that, with full knowledge of all pertinent facts, the Insurance Companies estopped themselves from denying that the policy was in force on October 26, 1951, by mailing to Marie Bettinger notice of cancellation effective October 27, 1951. The Bettingers asked that the policy be declared to have been in force on the day of the accident.

The interveners, Clara Egge and Lillian Hanson, also filed an answer to the complaint of the Insurance Companies, asserting that they were liable under the policy, and asking that the policy be adjudged to be in full force on October 26, 1951.

On September 22, 1952, the Insurance Companies moved the District Court to advance the instant case for trial so that it might be tried and determined before the personal injury actions against the Bettingers were tried. After a hearing, the motion was denied. This case and the two personal injury cases were on the trial calendar of the District Court for the term commencing November 4, 1952.

The personal injury cases against the Bettingers were first reached for trial, and were tried together before Judge

Bell and a jury. On the trial of those cases Marie Bettinger testified that she was at the time of the accident the owner of the automobile and that it was being driven by Lawrence with her consent. The evidence as to ownership of the automobile and as to the actionable negligence of Lawrence in its operation being undisputed, the District Court directed the jury to return a verdict for each of the plaintiffs, against both defendants, for such an amount as would compensate her for her injuries and for the medical and hospital expenses incurred by her as a result of the accident. The jury awarded Clara Egge $22,500 and Lillian Hanson $5,000. Judgments were entered accordingly.

The instant action of the Insurance Companies for a declaratory judgment came on for trial on January 19, 1953, before Judge Donovan without a jury. The issues made by the pleadings were whether Marie Bettinger owned the automobile at the time the policy in suit was issued, whether she parted with whatever interest she might have had when she transferred title to Lawrence on August 22, 1951, and whether the Insurance Companies were estopped by the notice of cancellation from asserting that she had no insurable interest at the time of the accident. She and Lawrence testified, as they had previously testified in the personal injury actions, that she had been at all times since the automobile was purchased the owner of it, that Lawrence never owned it, and that the transfer of the registered title to Lawrence on August 22, 1951, was to prevent creditors of Marie Bettinger's husband from taking the automobile. Opposed to this testimony was the transfer of title of August 22, 1951, with the declarations of Marie and Lawrence upon the bill of sale and the application for transfer that she had sold and Lawrence had pur-

chased the automobile, the fact that Lawrence alone drove the automobile, that it was usually in his possession, and that on several occasions he had referred to the automobile as his.

The District Court determined that Marie Bettinger owned the automobile at the time the policy was written, but that on August 22, 1951, she transferred the automobile to Lawrence and thereafter had no right or title to or interest in it and that for that reason the policy in suit was not in force on October 26, 1951. Upon the review of a non-jury case, this Court must regard the evidence in the light most favorable to the prevailing party. *Skelly Oil Co.* v. *Holloway,* 8 Cir., 171 F. 2d 670, 674.

There was no evidence that when the Insurance Companies gave notice of cancellation of the policy in suit they had any knowledge that the assured had transferred title to the automobile to Lawrence on August 22, 1951.

Although the issue of res judicata was not raised by the pleadings, the Bettingers and the interveners contended at the trial that the doctrine was applicable and that the Insurance Companies were estopped by the judgments in the personal injury actions from asserting in the instant action that Marie Bettinger was not the owner of the automobile at the time of the accident, since the judgments in those cases constituted a determination that she was the owner. The District Court ruled that the doctrine of res judicata did not apply, and held, in effect, that the Insurance Companies were neither parties to those actions nor in privity with the Bettingers and could not have had the issue of policy liability adjudicated in those actions. A judgment of nonliability was entered for the Insurance Companies. The opinion of the District Court is reported in 111 F. Supp. 511.

The contentions made by the Bettingers and the interveners on this appeal are, in substance, (1) that the evidence conclusively showed that Marie Bettinger was the owner of the automobile on October 26, 1951, (2) that the District Court erred in refusing to apply the rule of res judicata, and (3) that the rule of "insurable interest" has no application to policies of liability insurance under Minnesota law.

It is true, as the appellants assert, that the registration of a motor vehicle to a named individual as owner is not conclusive, but only prima facie, evidence of his ownership, and that evidence is admissible to show that the registered owner is not the actual owner. The question of the actual ownership of an automobile, if doubtful, is for the trier of the facts. *Holmes* v. *Lilygren Motor Co., Inc.*, 201 Minn. 44, 49, 275 N.W. 416, 419; *Bolton-Swanby Co.* v. *Owens*, 201 Minn. 162, 166, 275 N.W. 855, 858; *Flaugh* v. *Egan Chevrolet, Inc.*, 202 Minn. 615, 279 N.W. 582; *State* v. *One Oldsmobile Two-Door Sedan*, 227 Minn. 280, 285-286, 35 N.W. 2d 525, 529. It seems obvious that the question of the ownership of the automobile in suit, unless foreclosed by the judgments in the personal injury actions, was a question of fact for the District Court. The appellants assert in their brief that where the question is what inferences should be drawn from admitted facts, the findings of the trial court are, on appeal, given practically no weight and that this Court is free to consider the matter de novo.

In *Noland* v. *Buffalo Insurance Co.*, 8 Cir., 181 F. 2d 735, 738, we said:

"The District Court was the trier of the facts, and the judge of the credibility of the witnesses and of the weight of the evidence. The court was not compelled to believe evi-

dence which to it seemed unreasonable or improbable, or to accept as true the uncorroborated evidence (even though uncontradicted) of the insured and his wife, who were interested witnesses. *Rasmussen* v. *Gresly,* 8 Cir., 77 F. 2d 252, 254; *Yutterman* v. *Sternberg,* 8 Cir., 86 F. 2d 321, 324, 111 A.L.R. 736; *Elzig* v. *Gudwangen,* 8 Cir., 91 F. 2d 434, 440-444; *Hoyt* v. *Clancey,* 8 Cir., 180 F. 2d 152, 155.

"This Court will not retry issues of fact or substitute its judgment with respect to such issues for that of the trial court. *Cleo Syrup Corporation* v. *Coca-Cola Co.,* 8 Cir., 139 F. 2d 416, 417-418, 150 A.L.R. 1056, and cases cited; *Pendergrass* v. *New York Life Insurance Co.,* 8 Cir., 181 F. 2d 136. Under Rule 52(a) of the Rules of Civil Procedure for the United States District Courts, 28 U.S.C.A., 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' A reversal of this case would be virtually equivalent to instructing the trial court to accept as true and reliable, evidence which it evidently did not regard as either credible or convincing."

The power of a trial court to decide doubtful issues of fact is not limited to deciding them correctly. *Cleo Syrup Corporation* v. *Coca-Cola Co.,* 8 Cir., 139 F. 2d 416, 417; *Lamar* v. *United States,* 240 U.S. 60, 64-65; *Pope* v. *United States,* 323 U.S. 1, 14. Cf. *State Farm Mutual Auto Insurance Co.* v. *Skluzacek,* 208 Minn. 443, 449, 294 N.W. 413, 416. This Court has consistently ruled that a finding of fact is not clearly erroneous unless it is without adequate evidentiary support or results from a misconception or misapplication of the law. *Hudspeth* v. *Esso Standard Oil Co.,* 8 Cir., 170 F. 2d 418, 420.

We think the District Court reached a permissible conclusion in ruling that the judgments in the personal injury actions against Marie Bettinger, based upon a determina-

tion by the court in those cases that she was the owner of the automobile at the time of the accident, did not estop the Insurance Companies from asserting that their policy had lapsed prior to the day of the accident because of her lack of an insurable interest. It is, of course, true that if the Insurance Companies were, on October 26, 1951, the insurers or indemnitors of Marie Bettinger, her demand that they assume the defense of the personal injury actions would preclude them from contesting their liability for the judgments obtained by the plaintiffs in those actions. It is equally true that if in the instant case the District Court had found against the Insurance Companies on the issue of ownership of the automobile, their obligation to pay the personal injury judgments would have been established.

It has been the rule in Minnesota that where a liability insurer disclaims liability and refuses to defend its assured, a judgment against the assured does not preclude the insurer from having its day in court on the issue of its liability to the assured under his policy, and that it is only when the insurer, with full knowledge of the facts, unqualifiedly assumes and conducts the defense of an action against its assured that it is estopped by a judgment against him. See *Tozer* v. *Ocean Accident & Guarantee Corporation, Limited,* 94 Minn. 478, 484-485, 103 N.W. 509; *Patterson* v. *Adan,* 119 Minn. 308, 138 N.W. 281; *Mann* v. *Employers Liability Assurance Corporation,* 123 Minn. 305, 143 N.W. 794; *Eckert* v. *Joice,* 152 Minn. 440, 189 N.W. 125; *Humphrey* v. *Polski,* 161 Minn. 61, 200 N.W. 812; *Oehme* v. *Johnson,* 181 Minn. 138, 231 N.W. 817, 81 A.L.R. 1308; *Peterson* v. *Maloney,* 181 Minn. 437, 232 N.W. 790; *Logue* v. *Duchene,* 185 Minn. 337, 241 N.W. 51; *Downing* v. *Sterling Motor Co.,* 197 Minn. 429, 267 N.W. 250; *Simons* v.

Cowan, 217 Minn. 317, 321-323, 14 N.W. 2d 356; *Security Insurance Co.* v. *Jay* (D.C. Minn.), 109 F. Supp. 87, 90-91.

It has been long established practice in Minnesota for the plaintiff in a personal injury action who has obtained a judgment for the payment of which it is claimed an insurer of the defendant is liable, to garnish the insurer and try the question of its policy liability in the garnishment proceedings. That is shown by the cases which we have cited and is stated in *Oehme* v. *Johnson, supra,* page 139 of 181 Minn., page 817 of 231 N. W. It is apparent that under Minnesota practice an insurer who disclaims liability is not required to assume the defense of its assured or to participate in the trial of the personal injury action in order to preserve its right to litigate the question of its policy liability. We think that in this case the Insurance Companies could not have tried the issue of their claimed nonliability in the personal injury actions brought against the Bettingers by the interveners. The Insurance Companies' interests were adverse to those of the Bettingers on the issue of ownership of the automobile. We agree with the District Court that under Minnesota law the doctrine of res judicata was not available to estop the Insurance Companies from having their claim of nonliability adjudicated in the instant action.

The contention that the rule of "insurable interest" has no application to liability insurance is at best a doubtful question of Minnesota insurance law as to which this Court will accept the views of the trial court. See *Fireman's Fund Insurance Co.* v. *Vermes Credit Jewelry Co.,* 8 Cir., 185 F. 2d 142, 145-146; *Buder* v. *Becker,* 8 Cir., 185 F. 2d 311, 315.

The coverage of the policy in suit aside from liability

coverage certainly required an insurable interest. In the case of *Logue* v. *Duchene, supra,* 185 Minn. 337, 241 N.W. 51, Duchene, the actual owner of an automobile, had transferred the title upon the registration card to a Mary Hanson, as security for a loan, and mistakenly had had her designated as the insured in a policy of liability insurance on the automobile. A judgment for personal injuries arising from the operation of the automobile by Duchene was obtained against him by Logue, who garnished the liability insurer, which disclaimed liability in view of the fact that Duchene was not the named insured. In holding that the policy was subject to reformation, the Supreme Court of Minnesota said (page 340 of 185 Minn., page 52 of 241 N. W.):

"* * * But this transfer [to Mary Hanson] was in fact a mortgage. He [Duchene] retained full possession and control of the car. She had no right to its use or any dominion or control over it. Under such a situation she had no insurable interest under this liability policy against loss for injuries inflicted on others in the operation of the car. Had this been a policy covering damage to the car or loss from fire or theft, she would have had an insurable interest as mortgagee. But such is not the loss insured against by this policy. The court could well find that appellant's [the insurer's] agent had accurate knowledge of the true situation when the last application was given him and the first policy returned. The parties could not have intended a vain thing. For the premium received appellant intended to give liability protection to the owner of the car described in the policy, and no doubt defendant [Duchene] intended the same thing. That they erroneously thought it necessary to denominate the mortgagee the owner or the insured in the policy should not be fatal. The mistake perhaps was one of mixed law and fact. But that does not prevent reformation."

In the instant case it is apparent that the policy in suit was intended to afford liability and other protection to Marie Bettinger as the owner of the automobile at the time the policy was issued. The policy was not intended to protect her against the possibility that she might be sued as a defendant in personal injury actions growing out of the operation of the automobile by Lawrence after having transferred the actual ownership of it to him.

We think that the District Court, which had the duty and responsibility of determining the issue of ownership in this action, committed no error of law in entering the judgment appealed from.

The judgment is affirmed.

WOODROUGH, Circuit Judge, dissenting.

The federal District Court of Minnesota has entered two judgments against the appellant Mrs. Bettinger by the terms of which she is obligated to pay heavy damages to persons injured in a certain automobile collision and she is also denied the automobile insurance purporting to cover the accident which she admittedly bought and fully paid for. The court sitting with a jury first adjudged that she was the owner of the car that was negligently driven into collision and therefore she was responsible for the resultant damages, and thereafter the same court (another judge presiding) adjudged that she was not the owner of the car and because she was not the owner she had no insurance in respect to it.

The federal court had jurisdiction by reason of diversity of citizenship and the federal declaratory judgment

Act and the applicable procedure for the determination of the rights of all the litigant parties, that is, the injured persons, Mrs. Bettinger and the insurance companies, was the federal procedure. In the course of the proceedings all of those litigants appeared before the court when the insurance companies requested the court to take up the declaratory judgment case of the companies against Mrs. Bettinger ahead of the damage cases pending against her.

It was then apparent that the fundamental disputed question of fact that was put in issue in the pleadings of each of the parties litigant, and which had to be judicially determined in order to accord justice to any or all of them, was whether or not Mrs. Bettinger was the owner of the car that did the damage.

The court, on consideration, declined the insurance companies' request to take their case up first and it thereby put them on notice that a trial and judicial determination of the fact issue as to ownership of the car would be made in the damage cases.

The insurance companies chose not to produce the evidence they had on the issue of Mrs. Bettinger's ownership, but purposely stood by while the court tried out the issue, as justly and fairly as it was allowed to do, on the evidence that was adduced in the damage cases. Its solemn final determination was as stated, that Mrs. Bettinger was the owner of the car and liable for the damages.

It seems to me that the elemental principles of the law relating to indemnities then forbade the insurance companies to go back before the same court and assert against Mrs. Bettinger that she was not the owner of the car which the court adjudged that she was the owner of.

It can be seen by anybody that to permit the companies to so disregard the court's judgment invites the very anomaly of self contradicting decision that confronts us here. The federal courts and other courts are called on every day to decide justly between auto owners, injured persons, and insurance companies in respect to the rights and obligations accruing to them from collisions. A federal procedure in which it may be decided between them as to the controlling fact in controversy on one day that it is so, and on the next day that it is not so, is not compatible with sound dispensing of justice.

In this litigation Mrs. Bettinger's liability and the validity of her insurance policy both depended on whether she owned the car at the time of the accident. The affirmance here of the District Court's conclusions that she did own the car and that she did not own it is decided on first impression, nothing analogous being cited. The statutes imposing liability on automobile owners merely because of ownership are numerous as are the accidents, and the precedent of the affirmance by this court is of far-reaching importance.

I would reverse the judgment here appealed from and direct a judgment in accord with the finding made by the jury under the direction of the court that Mrs. Bettinger was the owner of the car involved in the accident.

(Judgment)

United States Court of Appeals
for the Eighth Circuit.
No. 14960. September Term, 1953.
Thursday, May 27, 1954.

Marie Bettinger and Lawrence E. Bettinger (Defendants), and Clara Egge and Lillian Hanson (Interveners),

Appellants,

vs.

Northwestern National Casualty Company and Northwestern National Insurance Company.

Appeal from the United States District Court for the District of Minnesota.

This Cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed.

May 27, 1954.

(Order denying Petition of Appellants for Rehearing)

United States Court of Appeals
for the Eighth Circuit.
No. 14960. September Term, 1953.
Thursday, July 1, 1954.

Marie Bettinger, et al.,

Appellants,

vs.

Northwestern National Casualty Company, et al.

Appeal from the United States District Court for the District of Minnesota.

Petition for rehearing filed by appellants in this cause having been considered by this Court, It is now here Ordered that the same be, and it is hereby, denied.

July 1, 1954.

FILED
SEP 13 195
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 284

MARIE BETTINGER and LAWRENCE E. BETTINGER,
Defendants-Petitioners,

and CLARA EGGE and LILLIAN HANSON,
Interveners-Petitioners,

vs.

NORTHWESTERN NATIONAL CASUALTY COMPANY and NORTHWESTERN NATIONAL INSURANCE COMPANY,
Plaintiffs-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 284

MARIE BETTINGER and LAWRENCE E. BETTINGER,
Defendants-Petitioners,

and CLARA EGGE and LILLIAN HANSON,
Interveners-Petitioners,

vs.

NORTHWESTERN NATIONAL CASUALTY COMPANY and NORTHWESTERN NATIONAL INSURANCE COMPANY,
Plaintiffs-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals is now reported in 213 F. (2d) 200.

STATEMENT OF THE CASE

We do not feel that it is necessary to make an additional statement of the case, but are willing to adopt the facts as

set out in the opinion of the Eighth Circuit Court of Appeals, in the Findings of Fact and the opinion of the trial court.

I.

Non-Applicability of Minnesota Financial Responsibility Law.

Petitioners undertake to discuss *The Minnesota Financial Responsibility Law,* which is contained in Chapter 170, *Minnesota Statutes* (1953) and also refers to the provision in respondents' insurance policy, Condition 8, see petition Page A-3. This appears here as the introduction of a new issue.

The policy involved in this case was not issued pursuant to *The Safety Responsibility Law of Minnesota,* Chapter 170, Minnesota Statutes, 1953. Therefore, the provisions of *The Safety Responsibility Law* do not apply.

Petitioners set forth a portion of *The Safety Responsibility Law,* viz; Minnesota Statutes, 170.40, Subd. 6 (1). Subdivision one of the same section makes it very clear that the "motor vehicle" liability policy referred to in said Subdivision 6 (1), is such a policy as is issued pursuant to the other provisions of The Safety Responsibility Law. See our Appendix, page 19. We therefore repeat that this policy was not issued pursuant to said law and is not controlled by the provisions of the law.

The article in 33 *Minnesota Law Review* 525, discusses the case of *Century Indemnity Co. v. Simon,* 77 F. Supp. 221, (D.C. N.J. 1948). The case was decided under the New Jersey Financial Responsibility Law and the decision is in

conformity with decisions in other states. The opinion clearly points out that the insurance company's liability is not absolute in instances where the policy is not issued pursuant to The Safety Responsibility Law. This is true in New Jersey as elsewhere. See the case of *Brodsky v. Motorists Casualty Insurance Co.*, 112 N. J. L. 211; 170 Atl. 243, affirmed 114 N. J. L. 154; 176 Atl. 143, and see also *Farm Bureau Mutual Automobile Co. v. Hammer*, 177 F. 2d 792, pages 796, 797.

The Minnesota Law Review article also points out that the provisions of insurance policies similar to that contained in the instant policy, Condition 8, petition page A-3, do not apply where the policy itself is not issued pursuant to The Financial Responsibility Law and that the provision does not constitute an assumption of additional liability. See the case of *Ocean Accident & Corp. v. Peerless & Co.* 10 N. J. Misc. 1185, 1189; 162 Atl. 894, 895.

II.

Sound Judicial Administration as a Matter of Federal Procedural Law.

It is not our understanding that sound administration of procedural law requires that a person shall be deprived of his day in court, or should be deprived of the right of presenting evidence to establish the truth. To the contrary, sound judicial administration of Federal procedure should guarantee a person his day in court and the privilege of establishing the true state of facts.

The language of Justice Rutledge in his dissenting opinion in the case of *Angel v. Bullington*, 330 U. S. 183, is appro-

priate to the general discussion here. We quote a portion of Justice Rutledge's opinion at page 202:

> "Res Judicata is a generally sound but by no means unlimited policy of judicial action. The doctrine is grounded in the need for putting an end to litigation. It does this by precluding the parties from showing what is or may be the truth. The sound core of the policy is that ordinarily one suit which determines or gives a full and fair chance for determining causes of action and issues between litigants should be enough and when this much has been given further opportunity should be denied."

* * * * *

At page 204:

> "Upon the law as well as the policy, the question has been one of balancing considerations of justice and convenience between stopping litigation and stopping the showing of the truth. That balance has never been so one-sided in favor of the former that the matter is ended simply by showing that a party has had some chance, however slight, in a previous litigation to secure a favorable decision."

As was pointed out by the Court of Appeals, petition B-12, the insurance companies in the instant case were in no position to litigate the issue of non-liability in the negligence cases, inasmuch as the insurance companies' interests were adverse to those of the Bettingers.

It should also be pointed out that the insurance companies were not parties in the negligence actions; and, that under Minnesota law, if these companies had defended the negligence actions without a reservation of rights, they would have been estopped from disputing the policy coverage. *Nikkari v. Jackson*, 226 Minn. 393; 33 N. W. 2d 36 and cases cited therein.

In the instant case, the Bettingers demanded that the companies defend the negligence actions, but did not offer to allow such defense to be undertaken under a reservation of rights.

If the companies had defended the negligence actions, they would not have been able to produce in those actions, the evidence which proved successful in the subsequent trial of the Declaratory Judgment action. Upon the giving of the testimony by Mrs. Marie Bettinger that she was the owner of the automobile at the time the loss occurred, neither she as a party, nor the companies who were not parties to those actions, could have introduced evidence to impeach her positive testimony.

The fact of ownership or non-ownership was one peculiarly within Marie Bettinger's own knowledge. Her testimony that she was the owner would be binding and she could not be impeached thereon. *Vondrashek v. Dignan,* 200 Minn. 530, 534; 274 N. W. 609, 612.

Even if contradictory evidence was received at the trial, it would have had no substantive weight, but would be only negative. *Ackerman v. Motor Sales & Service Co.,* 217 Minn. 309; 14 N. W. 2d 345.

There were therefore, only two courses of actions open to the companies; one was to await the entry of judgments in the negligence actions and then raise the issue of coverage upon garnishment proceedings. As the Circuit Court of Appeals pointed out, this is the usual procedure in Minnesota. The other course of action, which was followed, was to sue for a Declaratory Judgment in an effort to have the policy coverage determined before the trial of the negligence actions.

The existence of this dilemma is pointed out by the court

in the case of *Builders & Manufacturers Mutual Casualty Co. v. Paquette,* 21 F. Supp. 858, at page 865, (D.C. Me. 1938).

There is an additional reason why the intervenors-petitioners cannot complain of the failure to produce the evidence establishing non-ownership in the negligence actions. The reason is well stated by the Supreme Court in the case of *State Farm Mutual v. Coughran,* (1938) 303 U. S. 485, 492:

> "Moreover, in the circumstances, we may not conclude that respondent should prevail because petitioner failed to present facts in the tort action which he says if then presented might have defeated the very judgment upon which he now relies to support his claim."

III.

The Decisions Below Are Not in Conflict with the Decisions of the Fourth Circuit or the Decisions of this Court on Res Judicata.

Petitioners claim that the decision in the instant case is in conflict with the decisions in the Fourth Circuit. We submit that the decision in the instant case is in accord with the decisions in the Fourth Circuit in similar cases. See *Farm Bureau Mutual Insurance Co. v. Hammer,* 177 F. 2d 793 (C.C.A.-4, 1949) certiorari denied, 339 U. S. 914, and *Byrd v. American Guaranty & Liability Co.,* 180 F. 2d 246, (C.C.A.-4, 1950) affirming 89 F. Supp. 158.

In the case of *Aetna Casualty & Surety Co. v. Abbott,* 130 F. 2d 40, (C.C.A.-4, 1940) the insurance fidelity carrier had defended the first suit and in the second suit attempted to relitigate the issue as to plaintiff's possession of certain gold certificates in violation of law. The case is different

than the instant one, for two reasons. In the first place, in th Abbott case, the insurance company did not deny the existence of the insurance contract and it was therefore, in privity with the insured, Takoma Park Bank, so as to make the first judgment binding upon it. In the second place, the Aetna Insurance Company by defending the first action, bound itself by the judgment to the same extent as if it had been a party of record.

National Bondholders Corp. v. Citizens National Bank, 110 F. 2d 138, (C.C.A.-4 1940) did not involve an insurance policy but involved litigation over a mortgage. The decision held that the defendant Bank, as trustee in one action and as an individual and as trustee in the second action, was a party in both actions with an identity of interest and was therefore bound by the first judgment.

In the case of *Farm Bureau Mutual Automobile Insurance Co. v. Hammer,* 177 F. 2d 793, (C.C.A.-4, 1949) certiorari denied, 339 U. S. 914, reversing 83 F. Supp. 383, the claim of res judicata was interposed and in response to such a contention the court said at page 799:

> "It is, however, obvious that the binding effect of a judgment against the insured does not extend to matters outside the scope of the insurance contract, and that the Insurance Company is neither obligated to defend nor bound by the findings of the court if the claim against the insured is not covered by the policy. To hold otherwise would be to estop the Insurance Company by the acts of parties in a transaction in which it has no concern and over which it has no control, and to deprive it of its day in court to show that the transaction is foreign to the contract of insurance. "If it cannot do this" as was said in the dissenting opinion in Stefus v. London & Lancashire Indemnity Co., 111

N. J. L. 6, 166 A. 339, 341, "It is at the mercy of every unscrupulous litigant who, regardless of his facts, sees fit to falsely allege a claim on which the insurance company would be liable and thereunder establish another claim on which no liability could attach, and forsooth collect because the insurer cannot show the true facts."

"In accord is Restatement of the Law of Judgments, Section 107 (a), where the rights of indemnitee and indemnitor inter se after judgment against one of them are set out, and it is stated that if the third person has obtained a valid judgment against the indemnitee, both indemnitor and indemnitee are bound as to the existence and extent of the liability if the indemnitor has been given reasonable notice of the action and requested to defend; but in Comment (g) it is stated that this rule is binding only as to issues relevant to the proceeding; and that the judgment against the indemnitee does not decide issues as to the existence and extent of the duty to indemnify, and that in a subsequent action the indemnitor may show that the circumstances under which he was required to give indemnity do not exist."

The case of *United States v. Munsingwear*, 340 U. S. 36, (1950) affirming 178 F. 2d 204, is clearly distinguishable. The action was based upon two counts in the complaint; one asking for an injunction for violation of price regulations and the second, seeking treble damages for the same violations. The first count was litigated and the lower court found that the defendant had not violated the price regulations. The appeal was dismissed by the Court of Appeals as being moot and judgment entered. On the trial of the second count, it was held that the judgment in determining that the defendant had not violated the price regulations, was res judicata. There was no question of whether or not either

of the parties were in privity with a third person, for the parties in both trials were identical. The question of contractual privity is the crux of the instant case. The Supreme Court also pointed out that the United States could have protected itself by making a motion to vacate the first judgment and thereby have obtained a review of the issues of the findings of facts, which had been determined adversely to its claim. In the instant case, the insurance companies could not have made a motion to vacate the judgment in the negligence actions, for the reason that they were not parties to those actions or judgments, and therefore could not make any motions or appeal from the judgments.

A case in point is *State Farm Mutual v. Coughran,* 303 U. S. 485, (1938) reversing 92 F. 2d 239, (C.C.A.-4) in which it was held that the automobile liability insurance company had a right to litigate the question of insurance coverage in an action brought subsequent to the obtaining of a judgment in the negligence actions.

The Coughran case is cited as an authority in the Fourth Circuit in the case of *Byrd v. American Guaranty & Liability Co.,* 89 F. S. 158, 160, (D.C. Va. 1949) affirmed 180 F. 2d 246, (C.C.A.-4, 1950) in which the trial court said:

> "Nor, as against the defendants here, is the state court judgment an adjudication that, at the time of the accident, the car was owned by Williams and was with his consent driven by Heath. The question there was liability to the plaintiff for negligence; the question here is whether the defendants were in fact insured. Thus the issues were not the same."

See also the following cases: *Shelby Mutual Casualty Co. of Ohio v. Richmond,* et al, 2d Cir. 185 F. 2d 803, (1950);

Preferred Accident Insurance Co. of New York v. Grasse, 2d Cir. (1951) 186 F. 2d 987, (1951); *Builders & Manufacturers Mutual Casualty Co. v. Paquette,* (D.C. Me., 1938) 21 F. Supp. 858, 865.

IV.

The Decision Below Is Not Contrary to the Minnesota Law on Res Judicata.

The reasons why the rule of res judicata does not apply in this case may be summarized as follows: (1) The defense of res judicata was not pleaded as required by Federal Rules of Civil Procedure 8-c. (2) The issue or res judicata was not, at the time of trial nor at any other time, within the issues raised by the pleadings. (3) No evidence was received or even offered at the time of the trial on the issue of res judicata, but such evidence was tendered upon the motions to reopen. R. 85, etc. R. 99, etc. R. 111, etc. (4) The issue of ownership having been relitigated in the Declaratory Judgment suit without objection, the defense of res judicata was not thereafter available to the defendants or the intervenors. (5) In any event, the rule of res judicata would not apply for the reason that the insurance companies were not parties to the original tort actions, nor were they in privity with any of the parties involved in those actions.

The petitioners, by relitigating the question of ownership in the instant case, thereby waived the matter which they claim is concluded by the prior judgmnts. *Dillard v. McKnight,* 34 Cal. 2d 209; 209 P. 2d 387, 11 A. L. R. 2d 836.

Conceding that the trail court had the right to take judicial notice of its own records in the negligence actions brought by Clara Egge and Lillian Hanson; nevertheless, can it be said that such judicial notice could create an issue which was not included within the pleadings, nor supported by any evidence introduced? *United States v. Bliss,* 172 U. S. 321.

It is to be noted that the trial court, in its opinion, did discuss the doctrine of res judicata and held that the doctrine did not apply. R. 81, R. 120. Conclusions of Law, I, R. 96.

The reasons given by the trial court for its conclusions were: (a) That the records in the negligence actions did not disclose the basis of the court's decision in those actions and therefore, the question was left at large. (R. 82, L. 12). (b) That the doctrine is of judicial origin to prevent repetitious suits and that the doctrine should be applied cautiously so as to deprive a person of his day in court. (R. 81). (c) That these plaintiffs were entitled to a fair opportunity to litigate the question of ownership. (R. 81). (d) That these plaintiffs acted promptly to protect their interests. (R. 80, R. 82, R. 126, C, R. 133, R. 134). (e) That the question in the declaratory judgment action was not whether the Bettingers were liable to Clara Egge and Lillian Hanson, but whether the insurance companies were in fact insurers of Marie and Lawrence Bettinger. (R. 81, L. 6 and Note 10).

The applicable rule in such a situation is found in the Restatement of the Law of Judgments, Rule 107, Comment g, Page 517:

> Comment g
>
> "Relevant issues. The rule stated in Clause (a) binds both the indemnitor and the indemnitee only upon issues relevant to the proceeding. The judgment against the indemnitee does not decide issues as to the existence and

extent of the duty to indemnify. Thus, in a subsequent action the indemnitor may show that the circumstances under which he is required to give indemnity do not exist. For example, in an action by a surety against a person claimed to be a principal obligor, the latter may show that he never assumed the obligation, or that he was a co-surety or a surety for the claimant, or that he was induced to enter into the transaction by the fraud of the claimant." (Italics supplied)

The rule is cited and recognized in the case of *Vaksman v. Zurich General Accident & Liability Co.,* (1953) 172 Pa. Supp. 588, 94 Atl. 2d 186, page 189:

"Section 107, comment g, of the Restatement of Judgments, reads as follows: "The judgment against the indemnitee does not decide issues as to the existence and extent of the duty to indemnify. Thus, in a subsequent action the indemnitor may show that the circumstances under which he is required to give indemnity do not exist." Mr. Justice (now Chief Justice) Horace Stern in Fullmer v. Farm Bureau Mut. Ins. Co., 350 Pa. 451, at page 452, 39 A. 2d 623, stated: "It is scarcely more than a legal platitude to say that in a suit on an insurance policy the primary requisite for recovery is proof by the plaintiff that the claim comes within the general coverage of the policy.

"The controlling factor, it seems to us, in this case is that the first opportunity the insurer had to present its defense of non-coverage was in the action involved in this appeal. We hold, therefore, that the verdict against the insured in the trespass action does not bar the insurer from setting up as a defense in this action that the injuries were not accidental but were intentional, and hence not covered by the terms of the policy."

It should be pointed out that there was no obligation upon the insurance companies to defend the tort actions. *Lyman Lumber & Coal Co. v. Travelers Insurance Co.*, 206 Minn. 494, 289 N. W. 40.

It should also be noted that in the negligence actions the defendants Bettingers, by qualified general denial, denied that Marie Bettinger was the owner of the automobile. (R. 129, R. 132). On the other hand, in the Declaratory Judgment action the defendants Marie Bettinger and Lawrence Bettinger alleged that Marie Bettinger was the owner of the automobile at the time of the loss, (R. 12, Allegation III).

It should also be noted, as has been done by the Circuit Court of Appeals, that prior to the commencement of the Declaratory Judgment action, Marie Bettinger abandoned the defense of non-ownership, in the negligence cases, by her testimony given in her deposition on July 8, 1952, (R. 56, 61, L. 1). This deposition was taken before the commencement of the Declaratory Judgment action on August 6, 1952. (R. 133, L. 19). The issue of ownership therefore, was not litigated in the negligence actions in the sense that the issue was contested between the parties to those actions.

In this connection, see the cases cited by the trial court of *O'Neil v. Rueb*, (1943) 215 Minn. 296; 10 N. W. 2d 363; *Whitney v. Employers Indemnity Corp.*, (1925) 200 Ia. 25, 202 N. W. 236.

The Minnesota cases cited by petitioners are not in point, for the reason that the second actions did not involve the question of whether or not there was a contractual relationship so as to establish privity.

In *State Bank v. American Surety Co.*, 206 Minn. 137, 288 N. W. 7, it is apparent that the defendant would have been

allowed to show if the facts so warranted, that the surety contract was not in force at the time of the loss. As for example, if prior to the loss the plaintiff had transferred ownership of its property and assets without a policy assignment, as in the instant case, and as in the case of *Yoselwitz v. Peoples Bakery, Inc.*, 201 Minn. 600, 227 N. W. 221.

In *Olson v. Schultz*, 67 Minn. 494, 70 N. W. 779, cited by appellants, the defendant was not allowed to relitigate the question of liability. The defendant certainly would have had the right to prove that in truth and in fact, no relation of landlord and tenant existed between the plaintiff and the defendant; that is, if such proof were available.

In the case of *Liberty Mut. Ins. Co. v. J. R. Clark*, —— Minn. ——, 59 N. W. 2d 899, it is apparent that the defendants could have shown that they had not manufactured or had not sold the ladder in question, or that they had not made the alleged warranties which were the basis of the defendants' liability. The defendant conceded the contractual relationship and the existence of privity, which is not true in the instant case.

None of these decisions are in conflict with the general rules as set forth in *The Restatement of the Law of Judgments*, Section 107, Comment g, Rule 93 B, Rule 96 (2).

It would therefore seem to be well settled that a person, such as the insurance companies are here, who is not a party, nor in privity with a party to an action in which a valid judgment is rendered, is neither bound by nor entitled to claim the benefits of an adjudication upon any matter decided in said action. This is recognized by the Minnesota court in the case of *Aasen v. Aasen*, 228 Minn. 1, 12, 36 N. W. 2d 27, 34, in which the Minnesota court said:

"The amendment of pleadings is a matter lying largely within the discretion of the trial court, and its action will not be reversed on appeal unless it was clearly an abuse of this discretion. Bass v. Ring, 215 Minn. 11, 9 N. W. 2d 234; 5 Dunnell, Dig. & Supp. § 7696, and cases cited. Though the amendment in the instant case was not proposed until the case was called for trial, the trial court chose to base its refusal of the motion on the ground that the defense of *res judicata* had no merit. Counsel for Clara Aasen admits in his brief that to allow the defense in this case would be to extend the doctrine of *res judicata* to include a situation where there had been a final adjudication of an issue, even though plaintiff in a subsequent action in which the defense was raised was not a party to the original adjudication. There has been no decision in Minnesota which has applied the doctrine of *res judicata* in such a case, and we are not prepared to extend it so as to embrace such cases. The trial court correctly interpreted Minnesota law, and we cannot hold that there was an abuse of discretion in doing so."

V.

The Decision Below Does Not Conflict with the Seventh Circuit nor the Minnesota Decisions on the Issue of Insurable Interest.

We wish first to note that the trial court found that there was not only a transfer of the registration, but that there was an actual tranfer of the legal title to the automobile involved. (R. 94, Findings of Fact VIII.) The transfer was by bill of sale. (Plaintiff's Exhibit 2, R. 29).

The instant case is not governed by the rule set forth in 6 Blashfield Cyclopedia Automobile Law, Section 3873. The rule which applies in the instant case is set forth in 6 Blashfield Cyclopedia of Automobile Law, Section 3962.

Respondents do not contend that in all cases an insured must be the owner of property in order to have an insurable interest in a liability insurance contract. We do contend that it is necessary, in order to have a valid contract of insurance, that the insured must be subject to the risks or hazards which the policy insures against. The policy, of course, to be effective, must insure against the particular risks or hazards out of which the insured's loss arises.

The policy, in the instant case, insured Marie Bettinger against the risks and hazards arising out of her "ownership, maintenance and use of the automobile."

The risk and resultant loss however, arose out of the ownership and use of the car, not of the person insured against such risk, but arose out of the ownership and use by a stranger to the contract.

In this connection, see *Yoselwitz v. Peoples Bakery, Inc.*, 201 Minn. 600, 604, 277 N. W. 221, 224, (1938), in which it was held that a Workmen's Compensation policy did not enure to the benefit of the named insured's successor, even though the successor was organized for the specific purpose of continuing on with the named insured's business. The court said:

> "The coverage of workmen's compensation insurance is that stated in the policy. The insurer is not liable for a risk which he did not insure. The policy risk is confined to the employes of the insured and does not include employes of other employers. 71 C. J. pp. 912, 913; Dahl v. Wunderlich, 194 Minn. 35, 259 N. W. 399. Each

> of the policies contains a provision against assignment without the insurer's consent. In such a case the contract is a personal one. The benefits thereof do not extend to a successor of an insured employer corporation even though the successor was organized for the express purpose of taking over all the assets and business of the insured."

As the lower courts have held in the instant case, it appears that under Minnesota law it is necessary to have an insurable interest or insurable risk in an automobile liability policy. In addition to *Logue v. Duchene,* 185 Minn. 337, 241 N. W. 51, cited by the Eighth Circuit Court of Appeals, see the cases of *Downing v. Sterling Motor Co.,* defendant, *B. & M. Mutual Cas. Co., Garnishee,* (1936) 197 Minn. 429, 431, 267 N. W. 250, 251, and *Giacomo v. State Farm Mutual Automobile Ins. Co.,* 203 Minn. 185, 193; 280 N. W. 653, 657.

The case of *Hawkeye Security Ins. Co. v. Presbiterio & Sons,* 209 F. (2d) 281, (C.C.A.-7) relied upon by petitioners, is not in point, for the reason as the opinion points out, the decision is based on Illinois law as set forth in the case of *Mid-States Insurance Co. v. Brandon,* 340 Ill. App. 470, 92 N. E. (2d) 540, by which the circuit court was bound.

Appellants cite the Minnesota cases of *Banner-Laundry Co. v. Great Eastern Casualty Co.,* 148 Minn. 29, 180 N. W. 997, and *M. & St. Paul & S. S. M. R. Co. v. Home Insurance Co.,* 64 Minn. 61, 66 N. W. 132. These cases hold along with the general rule that it is not always necessary to be an owner of property in order to have an insurable risk in connection with the hazards of the use, transportation or other risks In the *Banner Laundry* case, the insured clearly was subject to risk of hazard upon the "plate glass breakage";

because, by the terms of its lease, the insured as tenant, was obliged to re-place such broken glass. In the *Railroad* case, the railroad had an insurable risk which consisted of its possible liability for negligence as a carrier in handling the property of others. The insureds in both of these cases, were in privity with the insurance carrier and had an insurable interest.

CONCLUSION

For the reason stated, the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

1. Minnesota Statutes, 1953 Vol. I, pages 1560, 1561, Sec. 170.40 Subd. 1 and Subd. 8.

"Subdivision 1. A "motor vehicle liability policy" as said term is used in this chapter shall mean an owner's or an operator's policy of liability insurance, certified as provided in section 170.38 or section 170.39 as proof of financial responsibility, and issued, except as otherwise provided in section 170.39, by an insurance carrier duly authorized to transact business in this state, to or for the benefit of the person named therein as insured."

"Subd. 8. Any motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this chapter."

2. Minnesota Statutes, 1953, Vol. I, page 1560, Section 170.38, Subd. 1 and Subd. 2.

"Subdivision 1. Proof of financial responsibility may be furnished by filing with the commissioner the written certificate of any insurance carrier duly authorized to do business in this state certifying that there is in effect a motor liability policy for the benefit of the person required to furnish proof of financial responsibility. Such certificate shall give the effective date of such motor vehicle liability policy, which date shall be the same as the effective date of the certificate, and shall designate by explicit description or by appropriate reference all motor vehicles covered thereby, unless the policy is an operator's policy.

Subdivision 2. When a certificate is filed showing that a policy or policies have been issued covering certain described motor vehicles or a limited operators

policy but not insuring such person when operating all other motor vehicles, the commissioner shall designate suitable restriction upon the drivers license of such person authorizing the operation of only such vehicles as are covered by the certificate. It shall be unlawful for such person to operate any motor vehicle not covered by such certificate. In the event a person desires to be relieved of the foregoing restriction and to be permitted to operate any motor vehicle, he may have such restriction removed upon filing a certificate showing that there has been issued to him a motor vehicle liability policy insuring him against liability arising out of the use of any motor vehicle. Laws 1945, c. 285, § 18."

3. Minnesota Statutes 1953, Vol. I, page 1560, Section 170.39 is similar to 170.38, except that it applies to nonresident automobile operators, and is not pertinent here.